

Supreme Court, U. S.  
FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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No. .... **76-95** .....

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GUADALUPE G. HERNANDEZ,

*Petitioner,*

VS.

THE UNITED STATES OF AMERICA,

*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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C. DAVID EVANS  
ALLEN F. CAZIER  
2500 Tower Life Building  
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONER

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## In the Supreme Court of the United States

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VS.

THE UNITED STATES OF AMERICA,

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### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 7, 1976.

### OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears in the appendix. (Appendix A).

### JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1976. A petition for rehearing, timely filed, was denied on June 23, 1976. (Appendix B). This petition for writ of certiorari is filed within thirty (30) days of the date of the order denying the petition for rehearing. Jurisdiction of the Supreme Court to grant the writ is conferred by Title 28, U.S.C., Sec. 1254 (1).

### QUESTION PRESENTED

Whether an accused in a federal narcotics prosecution is denied due process and the effective assistance of counsel by the failure of the government to disclose information favorable to the accused prior to trial where:

- (a) At a pretrial omnibus proceeding the government represents in writing that "it has disclosed all evidence in its possession favorable to the defendant on the issue of guilt . . ."; and
- (b) At two pretrial hearings the government presents evidence concerning a vital government witness (a confidential informant) to the effect that the witness has no criminal record, is not under investigation, is a walk-in informant and other evidence calculated to create the impression that the government considers the witness to be a credible person; and
- (c) At the trial of the case before a jury it is shown that the witness has been involved in numerous illegal narcotics related activities and other activities bearing upon the witness' credibility without the consent, but with the knowledge of the government and the government discloses for the first time that it had knowledge of this information; and
- (d) Because of the non-disclosures defense counsel is

unable to effectively impeach the witness since the government's agent now testifies that he has been aware of the witness' activities all along.

### CONSTITUTIONAL PROVISIONS

The question presented involves the due process clause of the Fifth Amendment and the assistance of counsel clause of the Sixth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S.C. Const. Amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S.C. Const. Amend. VI.



### STATEMENT OF THE CASE

On the 16th of April, 1975, a true bill of indictment was returned by the Grand Jury for the United States District Court for the Western District of Texas, San Antonio Division, charging that on or about the 4th day of March, 1975, in the Western District of Texas, Guadalupe G. Hernandez did knowingly, unlawfully and intentionally distribute approximately thirteen (13) ounces of heroin in violation of Title 21, United States Code, Section 841(a)(1). Pursuant to the local rules and practice of the trial court the Petitioner and his counsel together with the United States Attorney, elected to engage in omnibus in lieu of filing formal pretrial motions. The omnibus agreement form was filed on May 27, 1975, and approved by the trial court on June 19, 1975. On the omnibus form the government affirmatively represented that it had disclosed all evidence in its possession favorable to the defendant on the issue of guilt. The government further agreed to discovery of all oral, written, or recorded statements, or memorandum of them, made by the defendant to investigating officers or to third persons and in the possession of the government.

On June 19, 1975, a pretrial hearing was held on the Petitioner's motion to suppress evidence of four intercepted, tape recorded telephone conversations which had occurred on the second and third day after the date of the alleged offense between the Petitioner and the government's confidential informant, Paul Allen Boyles. The thrust of the Petitioner's motion was that because of Boyles' illegal narcotics related activities he was under pressure from the government to cooperate and his consent to the tape recording of telephone conversations between he and the Petitioner was not a voluntary consent. At this hearing the Drug Enforcement Administration's case agent testified, inter alia, that Boyles was a walk-in informant, that he had absolutely no criminal charges pending against him, that he was not "working off a case", and that he was not under investigation of any kind.

Petitioner, through his own independent pretrial investigation, was able to learn of extensive criminal activity on the part of the witness, Boyles, but because of the government's representations on the omnibus form and the agent's testimony at the pretrial hearing was led to believe that these criminal activities were done without the consent or knowledge of the government.

At the trial of the case upon cross-examination of the confidential informant, Boyles, it was shown by way of impeachment that:

- (a) Boyles, prior to the date of the alleged offense, had been involved in marijuana transactions with one "Goyo";
- (b) Boyles had transported approximately twelve (12) pounds of marijuana by airplane from the lower Rio Grande Valley to San Antonio;
- (c) Boyles had received money from a former employer to purchase the marijuana in the lower Rio Grande Valley;
- (d) Boyles had on more than one occasion delivered marijuana to one Manuel Onofre by using his wife to make the deliveries;
- (e) Boyles had on several occasions delivered marijuana, from his home to one Mike Kirk in January and February of 1975;
- (f) Boyles had delivered a quantity of procaine (a substance used to dilute heroin) to the same Mike Kirk to be resold in San Marcos, Texas; (Boyles testified that he had obtained this procaine from the Petitioner.);
- (g) During the period that Boyles was working as a confidential informant for the Drug Enforcement Administration he was individually handling, distributing and dealing in marijuana . . . and losing money;
- (h) During the early parts of 1975, Boyles was involved in negotiations toward the illegal transporting and

distribution of firearms;

- (i) Boyles had, since the date of the alleged offense, but prior to trial, been admitted to a state mental hospital for a course of observation and treatment.

Boyles further testified concerning the foregoing activities that he had informed the government agent of these activities after the fact, but that the government had not always approved.

When the government agent took the stand he confirmed for the first time that he had been informed of the witness' activities, after the fact, but that he had not consented thereto. He further confirmed that some, if not all, of the information regarding these activities was recorded in written reports in the government's possession. He further confirmed that prior to trial he had been questioned by defense counsel concerning the activities of the witness and that he had not informed defense counsel of these activities.

The credibility of the witness, Boyles, was of paramount importance because without his testimony the government had virtually no evidence incriminating the Petitioner. Some, but not all, of the witness' testimony could be corroborated by surveillance agents and the tape recorded telephone conversations, but the ultimate issue of the distribution of the heroin by the Petitioner to the witness, Boyles, was without corroboration.

The jury trial resulted in a verdict of guilty on September 25, 1975, and the Court, after overruling the Petitioner's motion for a new trial, sentenced the Petitioner on October 30, 1975. The United States Court of Appeals for the Fifth Circuit affirmed and denied rehearing.

#### REASONS FOR GRANTING THE WRIT

It is well established that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution. Brady v. Maryland, 373 U.S. 83, 87 (1963). When the "reliability of a given witness may well be determinative of guilt or innocence," non-disclosure of evidence affecting credibility falls within this general rule. Giglio v. United States, 405 U.S. 150, 154 (1972).

This court has recently considered the prosecution's constitutional duty of disclosure in the case of United States v. Linda Agurs, \_\_\_ U.S. \_\_\_ (1976), No. 75-491 [June 24, 1976]. The majority opinion in Agurs sets out three different fact situations in which the rule of Brady v. Maryland, *supra*, may apply. In the first situation the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew, or should have known, of the perjury. It is well established that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. This strict standard of materiality obtains because such prosecutorial misconduct involves a corruption of the truth-seeking function of the trial process.

In the second situation, a pretrial request by the defense for specific evidence is met by the government's suppression of exculpatory or otherwise material information. While the test of materiality is not clearly defined the Agurs opinion states that when a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. This second situation most closely resembles the instant case except that instead of making no response the government made a false and misleading response.

The third situation in which the Brady rule arguably applies, embraces a case in which only a general request for "Brady material" has been made or where no request is made. The standard of materiality in such a case, as established by Agurs, is that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.



Each of the foregoing fact situations involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. The instant case is distinguished in that the information became known to the defense at the trial, but not before. Petitioner contends that the instant case contains three essential elements:

- (a) A specific pretrial request by the defense for Brady material and a representation by the government that such request had been complied with (omnibus proceeding—written agreement of counsel); and
- (b) Pretrial testimony by a government agent calculated to bolster the credibility of the government's confidential informant and mislead the defense as to the true state of facts; and
- (c) Disclosure at the trial by the same government agent of his knowledge of the confidential informant's criminal activities bearing upon the informant's credibility and contra to the testimony of the same agent at the pretrial hearings.

Unlike the earlier cases of Brady v. Maryland, *supra*; Giglio v. United States, *supra*; and Moore v. Illinois, 408 U.S. 786 (1972), the instant case does not involve a newly discovered evidence question. In the instant case the jury did hear the evidence. However, the evidence presented was not in conformity with information provided the defense through pretrial discovery proceedings. Petitioner contends that the establishment of the proper standard of materiality in such a case, as well as the formulation of the relationship between the degree of prosecutorial misconduct and the degree of harm suffered by the accused which would necessitate a new trial, presents a substantial federal question which should be settled by this court.

In the Agurs case this court rejected a standard which would focus upon the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence.

Agurs, *supra*, at fn. 20. However, in the instant case, the standard of materiality cannot be based upon a projection of what the jury might have done had they heard the evidence. In the present case the prejudicial injury suffered by the defendant can best be evaluated in terms of the impact upon his pretrial preparation. There is authority for the view that where it appears that the prosecution deliberately suppressed evidence or that the undisclosed evidence is of such high value that it could not have escaped the government's attention, the "materiality" of the evidence to the defendant is measured by the affect of its non-disclosure upon his trial preparation rather than upon its probable impact upon the jury. United States v. Kahn, (2nd Cir. 1972), 472 F. 2d 272, 287 cert. denied, 411 U.S. 982 (1972); United States v. Polisi, (2nd Cir. 1969), 416 F. 2d 573, 576-577; United States v. Bonnano, (2nd Cir. 1970), 430 F. 2d 1060, 1063 cert. denied, 400 U.S. 964 (1970).

If certiorari is granted, the Petitioner will urge that a standard of materiality should be established which relates to the impact upon the defendant's pretrial preparation or, in the alternative, a standard similar to the second fact situation discussed in the Agurs opinion.



CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this cause.

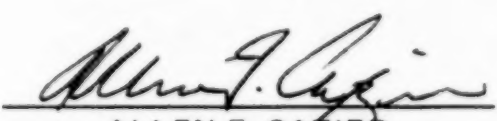
Respectfully submitted,

C. DAVID EVANS  
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2500 Tower Life Building  
San Antonio, Texas 78205

By   
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel, the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in a United States Post Office Mail Box, with air mail postage prepaid, on this 23 day of July, 1976.

  
ALLEN F. CAZIER

**In the United States Court of Appeals  
for the Fifth Circuit**

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NO. 75-4092\*  
SUMMARY CALENDAR

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs:

GUADALUPE G. HERNANDEZ, a/k/a  
"Lupe",

*Defendant-Appellant.*

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**Appeal from the United States District Court for the  
Western District of Texas.**

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(May 7, 1976)

Before WISDOM, THORNBERRY and TJOFLAT, Circuit  
Judges.

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\*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

**PER CURIAM:**

Guadalupe G. Hernandez was convicted on one count of distribution of heroin, in violation of 21 U.S.C. § 841 (a) (1). On appeal, he raises five grounds for reversing his conviction. We are unable to find merit in any of these contentions and affirm his conviction.

Hernandez argues first that the trial court erred in admitting evidence of an extraneous heroin offense occurring a few days before the crime he was charged with. Our review reveals, however, that the prerequisites established in *United States v. San Martin*, 5 Cir. 1974, 505 F. 2d 918, for the admissibility of evidence of previous crimes are satisfied in this case. The trial judge, therefore, did not err in admitting this evidence.

The second ground raised is that the failure of the government to disclose fully material related to the credibility of the key government witness deprived Hernandez of effective assistance of counsel and due process of law. We observe, however, that any potential harm arising from such failure was avoided entirely by the able activity of the appellant's counsel in investigating the background of the key government informant and in using information derived from this effort to impeach the credibility of this witness. The jury was apparently unpersuaded by this trial tactic, but we discern no prejudicial injury to the defendant growing out of the alleged non-disclosures by the government.

The final three arguments concern the admission into evidence of the tape recordings and transcripts of four intercepted telephone conversations between Hernandez and the government informant. The admission of this evidence appears proper under the authority of *Fountain v. United States*, 5 Cir. 1967, 384 F. 2d 624, cert. denied, 1968, 390 U.S. 1005. We must reject, accordingly, Hernandez's contention that the district court erred in this regard.

The conviction is **AFFIRMED**.  
(EXHIBIT A)

## In the United States Court of Appeals for the Fifth Circuit

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No. 75-4092

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

GUADALUPE G. HERNANDEZ,  
a/k/a "Lupe",

*Defendant-Appellant.*

---

Appeal from the United States District Court for the  
Western District of Texas

---

**ON PETITION FOR REHEARING**  
(June 23, 1976)

Before THRONBERRY and TJOFLAT, Circuit Judges.\*

**PER CURIAM:**

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. \*

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\*Judge Wisdom was a member of the original panel but because of illness did not participate in this decision.

(EXHIBIT B)

No. 76-95

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

---

**GUADALUPE G. HERNANDEZ, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT***

---

**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-95

GUADALUPE G. HERNANDEZ, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
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MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

---

Petitioner contends that the government's failure to disclose to him information relevant for impeachment purposes, which he nevertheless discovered through his own independent pretrial investigation, entitles him to a new trial under *Brady v. Maryland*, 373 U.S. 83.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment to be followed by a special parole term of fifteen years. The court of appeals affirmed (Pet. App. A).

Prior to trial the government produced certain of its records to petitioner and represented that it had disclosed all evidence in its possession favorable to him on the issue



of guilt. The information that petitioner charges the government with suppressing pertained to the criminal activities of its chief witness, Paul Allen Boyles, an informer. Boyles had undertaken these activities on his own for the claimed purpose of gaining the confidence of individuals in the narcotics business against whom he hoped to develop cases (Tr. 274). Boyles disclosed these activities, after the fact, to the Drug Enforcement Administration case agent (Tr. 104, 124, 151, 270, 271). The latter, while warning Boyles that he could get in trouble and risked prosecution if he continued such activities (Tr. 125, 270, 275), did not bring them to the attention of the prosecutor (Tr. 318).

On the basis of leads from records that the prosecution did disclose, petitioner undertook his own independent investigation and discovered Boyles's criminal activities, which he brought out fully on cross-examination of Boyles (Tr. 103-112, 114-129, 136-138, 151-152). At trial, the district court refused to impose sanctions against the government for withholding information, finding that the petitioner had not been prejudiced and that he had been able to put before the jury "very clearly and very dramatically and very forcefully \* \* \* that Mr. Boyles was involved in the sale of marijuana to various and sundry persons during the time that he was working for the Agency" (Tr. 313-314).

Petitioner concedes that the information allegedly useful in impeaching Boyles was available to him, and used by him, at the trial. Petitioner's only contention here is that the information should have been disclosed prior to trial, and that failure to make such disclosures somehow affected his ability to prepare for trial. Petitioner does not indicate how his pretrial preparation was or might have been affected by the government's non-disclosure.

In *United States v. Agurs*, No. 75-491, decided June 24, 1976, this Court expressly rejected the contention, advanced here by petitioner, that the government's duty to disclose information should turn upon the "impact of the undisclosed evidence on the defendant's ability to prepare for trial \* \* \* ." Slip op. 14, n. 20. As the Court said: "The rule of *Brady v. Maryland* [373 U.S. 83] arguably applies in three quite different situations. Each involves the discovery, *after trial*, of information which had been known to the prosecution *but unknown to the defense*" (slip op. 5; emphasis added). See also *Giles v. Maryland*, 386 U.S. 66, 96 (White, J., concurring); *United States v. Ruggiero*, 472 F. 2d 599, 604 (C.A. 2).

Where, as here, information allegedly useful in impeaching a prosecution witness is known to the defendant or brought out at the trial, any failure by the government to disclose such information, even if erroneous, is, as the court of appeals held, clearly harmless.<sup>1</sup> See *United States v. Acosta*, 526 F. 2d 670 (C.A. 5); *United States v. McMillan*, 508 F. 2d 101, 106 (C.A. 8); *United States v. Cole*, 449 F. 2d 194, 198 (C.A. 8); cf. *United States v. Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y.).

<sup>1</sup>Petitioner's suggestion that the government, prior to trial, "deliberately suppressed evidence" (Pet. 9) or "made a false and misleading response" (Pet. 7) with respect to its information on Boyles is in any event not supported by the record. As petitioner himself states, the DEA case agent represented only that "Boyles was a walk-in informant, that he had absolutely no criminal charges pending against him, that he was not 'working off a case', and that he was not under investigation of any kind" (Pet. 4). None of those representations was contradicted by the agent's subsequent testimony at trial or by any other information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

OCTOBER 1976.